

1957

The New Contract between Air Carriers and Passengers

Julian G. Gazdik

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Julian G. Gazdik, *The New Contract between Air Carriers and Passengers*, 24 J. AIR L. & COM. 151 (1957)
<https://scholar.smu.edu/jalc/vol24/iss2/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE NEW CONTRACT BETWEEN AIR CARRIERS AND PASSENGERS¹

JULIAN G. GAZDIK

Barrister and Solicitor in Montreal, Province of Quebec, Canada.

THE travelling public takes it for granted today that the ticket which the passenger purchases from the airlines will be accepted for carriage by other airlines, thus enabling the passenger to arrange for his entire journey to far distant points of the globe in one transaction. So far as his ticket is concerned, the passenger need not bother about currency restriction, exchange rates, etc.

This facility which international airlines offer to the public has two prerequisites: the interline agreement between a large number of carriers that they will accept tickets issued by each other; and perhaps even more important, a standard ticket embracing a standard contract which is acceptable to all parties to the interline agreement.

To appreciate the value of an agreement on such a standard ticket contract, one must consider the many jurisdictions under which international carriers operate, the many different systems of law in which this contract must be valid and the many interested governments whose painstaking scrutiny it must pass before it can become effective.²

This agreement was achieved through the International Air Transport Association (IATA) at Bermuda in 1949 and the resulting ticket is still in force. It will, however, be superseded later this year when a subsequent agreement, reached in January, 1957, becomes operative.³

The new ticket contract embodies some new principles, although it retains some of the old. It would be imprudent to attempt to analyze the validity of all of its provisions in the various jurisdictions concerned; but it is proposed here to review the new contract paragraph by paragraph and to confine comment to certain general principles only.

CONDITIONS OF CONTRACT

PARAGRAPH 1

"As used in this contract, 'ticket' means 'Passenger Ticket and Baggage Check,' 'carriage' is equivalent to 'transportation' and 'carrier' includes the air carrier issuing this ticket and all air car-

¹ The opinions expressed herein are the personal views of the writer and are not put forward as the views of the International Air Transport Association or any Member Airline. The writer wishes to acknowledge his indebtedness to Professor John C. Cooper, Legal Advisor of IATA, for his helpful and constructive comments.

² The validity of all agreements reached by airlines within IATA may be rendered ineffective by disapproval or reservation of the government of any one State whose national airline is an IATA Member (IATA Traffic Conferences Regulation).

³ Resolution 275b IATA Traffic Conferences, January 1957, approved by U.S. CAB in Order No. 11024 dated February 12, 1957.

riers that carry or undertake to carry the passenger or his baggage hereunder or perform any other service incidental to such air carriage; 'damage' includes death, injury, delay, loss or other damage of whatsoever nature arising out of or in connection with carriage or other services performed by carrier incidental thereto. Carriage to be performed hereunder by several successive carriers is regarded as a single operation."

The need for definitions in a contract of this nature is limited, hence only a few expressions are defined. Reference must be made to the definitions of "carrier" and of "damage." Both are purposely very broad. The definition of air carrier endeavors to include all air carriers, but not surface carriers, *e.g.* taxi or bus carriers, who may be in some relationship with the passenger. The law applicable to surface carriage may not be the same as that applicable to air carriage and it is not feasible to extend to surface carriers, the special regime of liability applicable to air carriage. The definition of "damage" is extended to cover all kinds of damage which may be the subject of claim so as to extend as far as possible the limitation of the liability of the air carrier.

Paragraph 3 of Article 1 of the Warsaw Convention provides that "a carriage to be performed by several successive air carriers is deemed, for the purpose of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation." Accordingly, the statement in the above paragraph of the new contract determines that carriage to be performed by several successive carriers is regarded as a single operation. This does not imply, however, that under the new contract, the first carrier assumes liability for the successive carriers. In fact he does not do so.⁴

In this connection, reference is made to the case recently decided in the State of New Jersey⁵ in which the Plaintiffs took action against the carrier with whom they made their original contract and the damages from which they suffered took place in the service of a successive carrier. It was the view of the Court that, under the terms of Article 30 (a) of the Warsaw Convention, unless the first carrier had expressly assumed liability for successive carriers, which in this case it had not done, no action could be taken against the first carrier.

PARAGRAPH (2) (A)

"Carriage hereunder is subject to the rules and limitations relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called 'the Convention') unless such carriage is not 'international carriage' as defined by the Convention. (See carrier's tariffs, conditions of carriage for such definition.) Carrier's name may be abbreviated in the ticket, the full name and its abbreviation being set forth in carrier's tariffs, conditions of carriage, regulations or timetables;

⁴ See Para. 4(1) of the new contract.

⁵ Tumarkin vs. Pan American World Airways, Inc., C.C.H. Av. L. R. 2. pp. 18, 152-18, 154.

and carrier's address shall be the airport of departure shown opposite the first abbreviation of carrier's name in the ticket; and for the purpose of the Convention the agreed stopping places (which may be altered by carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth in the ticket and any conjunction ticket issued herewith, or, as shown in carrier's timetables as scheduled stopping places on the passenger's route."

The first sentence is inserted in order to comply with para. 1 (e) of Article 3 of the Warsaw Convention requiring that the ticket shall contain a statement that the carriage is subject to the rules relating to liability established by the Convention. An earlier form of ticket was held not to comply with this requirement.⁶

The contract provides also that the name of the carrier may be abbreviated. This is a practical requirement, the object of which is to save time and space on the ticket. Whilst the issuing carrier's name will, in most cases, appear in a prominent place on the passenger ticket, the connecting and successive carriers' names appear on the ticket only in a form of a three-letter abbreviation. These three-letter abbreviations, such as TWA, PAA or TCA are often quite well known to passengers. Should there be any doubt, however, they are explained in carrier's tariffs which are available to the passenger at the carrier's offices.

In accordance with the contract, agreed stopping places may be inserted on the ticket, or alternatively may be those places which are included in carriers' tariffs, conditions of carriage, timetables as scheduled stopping places on the passenger's route. The validity of the principle of including agreed stopping places in the contract by reference, has already been tested before the courts in the U.S. and in the U.K. The effect of the decisions is that the carrier does not lose the limitation of liability under the Warsaw Convention, as long as the ticket is issued and as long as a reference is on the ticket to the carrier's timetables, indicating the agreed stopping places.⁷

In approving the Conditions of Contract, the CAB⁸ makes specific reference to the last few lines of para. 2 (a) of the Contract and comments as follows:

"In those cases where the origin and destination which are shown on the ticket are in the territories of different countries, the international character of the journey and the possible applicability of the Convention is apparent from the ticket, so that omission of the agreed stopping places from the ticket is of little practical consequence, as is recognized in the revision to Section 2, embodied in the Protocol to the Warsaw Convention, adopted at The Hague on September 28, 1955, for submission to the various governments. However, when the place of departure and origin are in the terri-

⁶ *Westminster Bank vs. Imperial Airways, Ltd.*, (1936) 2 All E. R. 890; L. T. 86; 52 T. L. R. 607; 80 Sol. Jo. 794; 42 Com. Cas. 1; 55 Lloyd L. R. 242; (1936) U.S. Av. R. 39; Digest Supp. 71, 350, 381, 382, 389, 391, 405, 415, 555.

⁷ *Grey vs. American Airlines, Inc.* (1950) U.S. Av. Rep. 507; and *Preston and Another vs. Hunting Airlines* (1956), 1 Lloyd's Rep. 45.

⁸ CAB Order No. 11024, February 12th, 1957.

tory of the same country, the Convention does not apply unless there is at least one agreed stopping place outside that country shown on the ticket. In such a case, the passenger may be completely misled as to whether his flight involves a stop in another country and as to the possible application of the Convention to his journey unless the ticket actually shows an agreed stopping place outside the country. For this reason, the Board is of the opinion that it would be desirable that the provision of the conditions attempting to make the scheduled stopping places on the passenger's route shown in the timetables the agreed stopping places for the purposes of the Convention, should have specified that in the case where both the origin and destination were in the territory of the same country at least one agreed stopping place outside the country should appear on the ticket."

Notwithstanding this expression of a preference by the Board, the IATA ticket was approved in its quoted form. The main thing to remember in this connection is the relatively small number of cases in which the international character of the journey would depend on such an agreed stopping place. The CAB itself recognizes this in the above opinion. To require air carriers to put the agreed stopping place in some cases on the ticket would be legislating for the exceptional case. In fact many carriers have felt that any requirement of inserting stopping places on the ticket would be unduly burdensome and might cause considerable confusion. Moreover, the Warsaw Convention requirement is believed to have been met by the statement on the ticket that the carriage is subject to the Warsaw Convention and by reference to agreed stopping places, if any, on the timetables, tariffs, etc.

PARAGRAPH (2) (B)

"To the extent not in conflict with the foregoing all carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention or extending the rules of the Convention to carriage which is not 'international carriage' as defined in the Convention), government regulations, orders and requirements, (ii) provisions herein set forth, (iii) applicable tariffs, and (iv) except in transportation between a place in the United States and any place outside thereof, conditions of carriage, regulations and timetables (but not the time of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services."

The manner in which the new contract is drawn up makes it plain that the contract is subject to the Warsaw Convention. Where the Convention is not applicable, because the carriage is not "international" in the sense of the Convention, or because the Convention is silent on the issue before the Court, then under para. 2 (b), applicable national laws are made to govern the contract. The expression "applicable law" is sufficiently broad to cover statutes extending the rules of the Convention to carriage which is not international carriage, such as the Statutes of the U.K., Belgium, Switzerland, Holland and the

Scandinavian countries, and other statutes regulating air carriers' liability in certain jurisdictions and finally in the absence of such statutes, the applicable common law of carriers of the State.

The contract contains a reference to tariffs and, with certain limitations, to conditions of carriage and rules and regulations of the carrier. Tariffs are an expression well known in the U.S. and Canada. In both countries there are statutes requiring carriers to file with the appropriate authorities, rules and regulations pertaining to carriage which affect the relationship between the carrier and the passenger. It would appear that these rules, once filed with, and accepted by, the appropriate authority, become part of the contract between the passenger and the carrier.⁹

This point, however, is not without ambiguity. The requirements of statutes in Canada and the U.S.A. are not entirely the same, nor do the statutes define exactly what is required to be filed and what is not.

In this connection, Section 403 of the Civil Aeronautics Act of 1938, as amended, requires that "Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares and charges for air transportation . . . showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation." However, CAB Economic Regulations, Part 221—Construction, Publication, Filing and Posting of Tariffs contain the following rule: "(h) Personal liability rules. No provisions of the Board's regulations issued under this part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or conditions relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms."¹⁰

The amendment was intended to preclude the inclusion of personal liability rules in tariffs tendered for filing with the CAB—setting aside to this extent the generally accepted principle of U.S. jurisprudence whereby personal injury rules, when made part of the filed tariffs, are effective with the force of law. As of the date of effectiveness of the above mentioned CAB Order, the CAB does not require or permit the filing of certain rules relating to carriage because they are not considered "proper tariff material."

The insistence of the CAB on denying the effectiveness of provisions of conditions of carriage, regulations and timetables to carriage to and from the U. S., other than filed as a tariff, has the following

⁹ Mack vs. Eastern Air Lines, Civ. No. 7941 (D.C. Mass. June 2, 1949), 2 Avi. 15,002; Jones vs. Northwest Airlines, 22 Wash. 2d 863, 157P. 2d 728 (1945), 1 Avi. 1272; Boston & Maine Railway vs. Hooker, 233 U.S. 97.

¹⁰ Order Serial No. E-8756, issued by the Board of November 10, 1954, requires all air carriers and foreign air carriers to cancel from their tariffs, on or before January 1, 1955, all rules, regulations, or provisions stating any limitation on, or condition relating to, carrier's liability for personal injury or death.

result: carriers cannot have tariffs filed with the CAB in which liability rules for personal injury are mentioned; nor can they have such rules in any other form, because even if they were to have such rules in the form of conditions of carriage, rules or regulations, such conditions of carriage, rules and regulations could not effectively be incorporated by reference in the passenger ticket.¹¹ Had carriers not agreed to use the uniform passenger ticket, presumably the CAB would not be in a position to check the liability rules dealing with personal injury applicable to "non-Warsaw" carriage included in the ticket contract, not having the necessary authority to do so in respect to tickets used in foreign (international) air transportation.¹²

In Canada, the Aeronautics Act¹³ provides that "Subject to the approval of the Governor in Council, the Board may make regulations: (i) respecting traffic, tolls and tariffs, and providing the disallowance or suspension of any tariff or toll by the Board, the substitution of a tariff or toll satisfactory to the Board or the prescription by the Board of other tariffs or tolls in lieu of the tariffs or tolls so disallowed; (j) respecting manner and extent to which any regulations with respect to traffic, tolls or tariffs shall apply to any air carrier licensed by the Board or to any person operating an international air service pursuant to any international agreement or convention relating to civil aviation to which Canada is a party; . . ."

In the Board Regulations,¹⁴ it is provided that every air carrier shall file or cause to be filed with the Board, and keep open to public inspection in such form and manner and containing such information as the Board may direct, tariffs applicable to carriage, and shall establish just and reasonable tolls, rules, regulations, terms and conditions of carriage and practices, and services applicable to the carriage.

The Canadian Air Transport Board construes these regulations to mean that all regulations affecting the contract must be filed as tariffs. Therefore, there is some conflict between the principles of the Canadian ATB and those of the U.S. CAB which explains the need for the continued filing in the U.S. of tariffs dealing with personal injury matters with the reservation mentioned above.

Whatever the requirements of the law, both the ATB and the CAB appear to insist that the only regulation which should be a part of the contract should be the regulation filed with these Authorities

¹¹ Air carriers and foreign air carriers who have filed subsequently to March 2, 1954, tariffs including rules for personal injury and death with the CAB have done so with the reservation that "rules affecting liability of carriers for personal injury or death are not permitted to be included in tariffs filed pursuant to the laws of the United States, and Rule 18(J) (3) is included herein as part of the tariff filed with government other than the United States and not as part of Tariff CAB No. 191 filed with the Civil Aeronautics Board of the United States."

¹² In this connection, reference is made to the apparent difference in authority conveyed to the CAB by the Civil Aeronautics Act of 1938, as amended, in Article 1002(d) with respect to interstate and overseas air transportation, and in Article 1002(f), with respect to foreign air transportation.

¹³ Canadian Aeronautics Act of 1927, as amended, RSC—Part II (Interpretation) Chapter 2, paragraph 13.

¹⁴ Para. 13(1) and (7) of the Commercial Air Services Regulations, Canada Gazette (Part II) of Wednesday, January 12, 1955.

in the form of tariffs. Thus, the new ticket makes a special provision applicable to "non-Warsaw" carriage with respect to traffic to and from the U.S. and Canada, depriving the carriers of the right to rely on their conditions of carriage, regulations and timetables. The effect of this special provision is that unless carriers file the desired term of contract, as part of their tariff, these terms are not operative.

PARAGRAPH 2(C)

"Unless expressly so provided, nothing herein contained shall waive any limitation of liability of carrier existing under the Convention or applicable laws."

Whilst there is no express undertaking by carriers in the new contract to accept any limit of liability in excess of the Warsaw amounts, or to waive any defences or other rights under the Convention, paragraph 2(c) is incorporated in order to dispose of any possibility that the new contract might be interpreted, in view of Article 22 of the Convention, as waiving the limitation of liability of carrier under the Convention.

PARAGRAPH 3

"Insofar as any provision contained or referred to herein may be contrary to a law, government regulation, order or requirement, which severally cannot be waived by agreement of the parties, such provision shall remain applicable and be considered as part of the contract of carriage to the extent only that such provision is not contrary thereto. The invalidity of any provision shall not affect any other part."

Although this provision anticipates the possible existence of a law or government regulation which might override a certain provision of the new contract, it includes a qualification with respect to such law or government regulation. If it can be waived by agreement between the parties, then the contract operates as a waiver and the law or regulation does not apply.

PARAGRAPH 4

"Subject to the foregoing:

(a) Liability of carrier for damages shall be limited to occurrences on its own line, except in the case of checked baggage as to which the passenger also has a right of action against the first or last carrier. A carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent.

(b) Carrier is not liable for damage to passenger or unchecked baggage unless such damage is caused by the negligence of carrier.

(c) Carrier is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders or requirements, or from failure of passenger to comply with same.

(d) Any liability of carrier is limited to 250 French gold francs (consisting of 65½ milligrams of gold with a fineness of nine hun-

dred thousandths) or its equivalent per kilogram in the case of checked baggage, and 5,000 such French gold francs or its equivalent per passenger in the case of unchecked baggage or other property, unless a higher value is declared in advance and additional charges are paid pursuant to carrier's tariffs or regulations. In that event the liability of carrier shall be limited to such higher declared value. In no case shall the carrier's liability exceed the actual loss suffered by the passenger. All claims are subject to proof of amount of loss.

(e) Any exclusion or limitation of liability of carrier under these conditions shall apply to agents, servants or representatives of the carrier acting within the scope of their employment and also to any person whose aircraft is used by carrier for carriage and his agents, servants or representatives acting within the scope of their employment."

Paragraph (a) serves two purposes. The first is to assure that the carrier against whom an action can be brought should be the one on whose line the damage has occurred. Taking into consideration inter-line carriage, where several successive carriers participate in the carriage, it is necessary to determine which of the carriers is responsible for the damage in case of death of, and personal injury to, the passenger. In case of damage to checked baggage, in accordance with Article 30 of the Warsaw Convention, the passenger has a direct right of action against the first and the last carriers.

The last sentence of this paragraph endeavors to limit the responsibility of the carrier who has merely issued a ticket, or checked baggage, but who did not participate in the carriage otherwise.¹⁵ The purport of this sentence is to deny a right of action against such carrier. The proper action accordingly will be against the carrier who, in fact, carried the passenger and the baggage.¹⁶

Paragraph 4(b) and (c). If it can be said that the new ticket contract establishes a system of liability for "non-Warsaw" carriage, then the principles of this system are to be found in the two sub-paragraphs (b) and (c) of paragraph 4.

The first observation which must be made is to the striking silence of the contract on many important principles which presumably will be governed by national laws applicable to the contract. This silence may be explained by the fact that the Warsaw Convention has such general application that the majority of traffic would, in any case, be governed by the Convention.

Where the Convention does not apply, a distinction is made between the liability of carrier to passengers, and for unchecked baggage, and the liability of carrier for checked baggage.

In the first instance (liability of carrier to passengers and for unchecked baggage), the liability exists only if the damage is caused

¹⁵ It has recently been established in the U. S. that a carrier, whose business is transacted for it through the office of another carrier, can be sued in its own name: See *Kappel vs. United Airlines, Inc.*, *British Overseas Airways Corporation*, *British Commonwealth Pacific Airlines, Ltd.*, *Qantas Empire Aviation Ltd.*—Sup. Ct., New York County, January 30th, 1956.

¹⁶ *Tumarkin vs. Pan American World Airways, Inc.*, C.C.H. Av. L. R. 2.

by the negligence of carrier. In the second case (liability of carrier for checked baggage), the liability exists to the extent that common law provides for liability, *i.e.* in many jurisdictions the carrier is held responsible, irrespective of any negligence on its part (strict liability).¹⁷

Furthermore, in the case of checked baggage, the result of the silence of the ticket contract may be that the burden of proof is shifted to the carrier. In many jurisdictions where the carrier receives checked baggage in good condition, and delivers the same in bad condition, there will be a presumption of negligence against the carrier and he must prove that the damage was due to some recognized expected cause for which he was not liable.¹⁸

There is therefore a major difference between the 1957 Contract and the 1949 Contract as to principles of liability in respect to loss of or damage to checked baggage. Whereas under the 1949 Contract, the passenger was required expressly to prove carrier's negligence, under the 1957 Contract, the burden may in many instances fall on the carrier to establish that that damage to checked baggage is due to some exception incorporated in the contract or recognized as applicable to the carriage in the particular jurisdiction. This is a significant change which many have implications, but basically it is a sound rule. The new system has the advantage of following closely the rules of common law in many jurisdictions and will therefore apply in States where the rule of the 1949 Contract might be overridden by applicable laws.

Looking at the contract now from the point of view of defences available to the carrier, we find few express defences applicable to "non-Warsaw" carriage. This fact should not in any way be construed as a waiver of defences available to carrier under the various legal systems, such as Act of God, public enemies, contributory negligence of the

¹⁷ It is frequently said that a common carrier is an insurer of the cargo and checked baggage, and accordingly, a common carrier may be liable without regard to negligence. (See *Corpus Juris Secundum*, Footnote 32 on pp. 132-3.) Such statement, however, is not without qualification. In common law, subject to certain exceptions, the common carrier is strictly liable for loss of or injury to cargo or checked baggage received for carriage. (*Atlantic Coast Line R. Co. vs. Sandlin* 78 So. 667, 75 Fla. 539.) There is an implied agreement by common carriers to carry safely, and they are held strictly accountable for the loss of, and failure to deliver, goods received by them for carriage. (*Eastern Shore of Virginia Produce Exch. vs. New York P. & N. T. Co.*, 126 S.E. 674, 141, Va. 611.) They are liable for all losses and injuries except as arise from an Act of God, or of public enemy, the negligence of the shipper or the inherent nature or vice of the property and such other causes which are recognized in various jurisdictions. To all of these excepted causes, the carrier may still be liable by reason of his own negligence or that of his agents, servants or employees. (*Corpus Juris Secundum*, p. 132, Section 13.) When the loss is not due to the excepted causes, it is immaterial whether the carrier was negligent or not and the common carrier cannot escape liability by proving reasonable care and diligence or by showing that there was no negligence on his part. This general rule as to the carrier's liability is demonstrated by the cases holding the carrier liable for loss of goods by fire, water, theft, or robbery or other accidental cause or by negligence or other torts. Although this liability system applies to common carriers, it does not apply to private carriers who are not strictly liable and who are liable only for their negligence. Private carriers are not considered insurers of the safety of the goods entrusted to them for transportation.

¹⁸ *Corpus Juris Secundum*: P. 189. *Thomas vs. Baltimore & O. R. Co.*, 16 Ohio N.P., N.S., 194.

Plaintiff, inherent vice of the baggage, etc.¹⁹ These defences will be available to carriers.

The only defences expressly mentioned in the contract²⁰ are a disclaimer by carrier that it is not liable for any damage directly and solely arising out of its compliance with any laws, government regulations, orders or requirements, and a disclaimer for liability for damage arising from failure of passenger to comply with laws and government regulations.

The 1949 Contract went somewhat further. It provided expressly that carrier was not liable for any damage arising directly or indirectly out of compliance with laws, government regulations, orders or requirements; or from any cause beyond carrier's control.

The basic objection against the defences in the 1949 Contract on the part of certain governments was that they went further than the defences available to common carriers under common law. Against the exception of liability for compliance with laws and government regulations the specific objection was that, as contained in the 1949 Contract, it would apply irrespective of the fact that negligence of carrier caused or contributed to the damage. To overcome this objection, the 1957 Contract states expressly that the defence will apply only if the damage is caused "directly and solely" by compliance with laws and regulations. In other words, were carrier's negligence to contribute to the the damage, the defence may fail as the carrier would not be able to say that the damage was solely due to compliance with regulations. This change may, in some jurisdictions, require carriers to prove that, in complying with laws and regulations, they were without fault.

It must be admitted that under the new 1957 Contract, "Warsaw" and "non-Warsaw" carriage are not in all respects governed by the same rules. There are differences but of little practical importance. Taking first the system of liability, the presumption of negligence against carriers incorporated in the Warsaw Convention may prevail in the new contract only in connection with checked baggage, with respect to which, as will be seen, carriers limit their liability. The presumption will not apply in regard to death or injury of a passenger or to loss of or damage to unchecked baggage. In these cases, negligence of carrier must be established before the damage can be recovered. Carrier's liability is not limited in the new contract with respect to injuries to passengers or death.

Turning now to the defences under the Warsaw Convention, there are three: 1) under Article 20 (1), carrier is not liable if he proves that he and his agents have taken "all necessary measures" to avoid the damage or that it was impossible for him or them to take such measures; 2) the disclaimer of liability for negligent pilotage in case of baggage (Article 20 (2)); and 3) the disclaimer of liability in the event there is contributory negligence (Article 21). Although these

¹⁹ See para. 2(c) of new contract.

²⁰ See para. 4, sub-para. (c).

defences are not specifically mentioned in the new ticket contract they are nevertheless applicable to "Warsaw" carriage.

Comparing the Warsaw defences with the defences presumably applicable to "non-Warsaw" carriage, it is a moot point whether "all necessary measures" cover the same area as the common law exceptions, *i.e.* Act of God, public enemy, negligence of shipper, inherent nature of the property. Perhaps the results in a case involving theft from a carrier would be different. In respect to checked baggage, carrier may not plead theft as a common law defence but carrier may sustain effectively that the theft occurred although "all necessary measures" have been taken by the carrier. Accordingly, the defence of theft which might be good under the Convention might fail in common law but otherwise the outcome of the common law exceptions and the Warsaw defence might be the same.

Negligent pilotage has been deleted as a defence with respect to baggage under the terms of the Hague Protocol²¹ and will not be available after the Protocol becomes effective. It is not set up as a defence in the new ticket as to "non-Warsaw" carriage.

The third defence under the Convention, namely contributory negligence, is not referred to specifically in the new contract but this defence should be available to the carrier in "non-Warsaw" carriage to the extent statutes or common law provide for the defence in certain jurisdictions. Presumably, similar results will obtain in both "Warsaw" and "non-Warsaw" carriage.

Paragraph (d). Although the 1957 Contract makes no mention of any specific limitation of liability with respect to personal injuries and death of the passengers, in the case of carriage which falls under the regime of the Warsaw Convention, the Warsaw limitation of liability will apply (*i.e.* 125,000 francs, which is approximately \$8,300 U.S.). After the Protocol becomes effective, the Protocol limitation of liability will be effective (*i.e.* 250,000 francs or \$16,600 U.S.). This is the same rule as under the 1949 Contract.

The 1957 Contract, unlike the 1949 Contract, does not attempt to limit carrier's liability for death or injury to passengers in the event carriage is not covered by the Warsaw Convention. Certain governments strongly objected to any contractual limitation of liability on the part of carriers with respect to passengers. Influenced by these objections, and by the fact that in many jurisdictions limitation of liability by contract is void in any case,²² as being contrary to public policy, and additionally by the fact that in other jurisdictions, statutes

²¹ Protocol adopted at The Hague in September 1955 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929. The Protocol is not as yet in force. It has been signed by 31 States and ratified by five. It will go into force only when 30 States, parties to the Convention of 1929, have ratified it.

²² *Law vs. Transcontinental Air Transport, Inc.*, 1931 U.S. Av. Rep. 205; *Allison vs. Standard Airlines*, 65 F. 2d 668, 1933 U.S. Av. Rep. 92; *Curtiss-Wright Flying Service, Inc. vs. Glose*, 66 F. 2d 711, 1933 U.S. Av. Rep. 26; *Conklin vs. Canadian Colonial Airways, Inc.*, 266 N.Y. 244, 194 N.E. 692, 1935 U.S. Av. Rep. 97.

provide for limitation of liability²³ irrespective of any contractual provision, carriers decided to omit limitation of liability in respect to passengers from the standard ticket. It should be observed that the standard ticket and the new contract is designed to apply only to inter-line transportation, *i.e.* where the carriage is performed by more than one carrier. Therefore, it would appear that any carrier desiring to use a separate form of ticket for on-line transportation can do so and insert on such on-line ticket, any limitation of liability for death of or injuries to the passenger if it so desires. Of course, the validity of such limitation will be subject to applicable laws.

With respect to baggage, checked and unchecked, whether the carriage is governed by the Warsaw Convention or not, the limits of liability for loss of, or damage to, such baggage under the new contract, will be the same as are now contained in the Warsaw Convention, *i.e.* 5,000 francs (*i.e.* \$332 U.S. approx.) for unchecked baggage per passenger and 250 francs per kilo for cargo (*i.e.* \$16.60 U.S. approx.)²⁴ This is an important change from the 1949 Contract which incorporated a \$100 limitation of liability of carrier for baggage, irrespective of weight. The \$100 limitation was, for many years, acceptable in the United States for domestic carriage by air, and is still acceptable in respect to surface transport.²⁵ But in an effort to obtain international uniformity by extending contractually the Warsaw Convention limits where they would not apply otherwise, carriers have now agreed to incorporate in the 1957 Contract the Warsaw limits with respect to checked baggage, as well as other property carried by the passenger. It must be pointed out, however, that these are limitations of liability and not necessarily the amounts payable by carriers in case of any loss suffered by the passenger. The passenger must prove the value of his loss before he can recover.

Paragraph (e) extends the limitation of liability of carrier to agents, servants and representatives of carrier. The Hague Protocol²⁶

²³ Colorado, \$10,000; Connecticut, \$20,000; Illinois, \$20,000; Indiana, \$15,000; Kansas, \$15,000; Maine, \$10,000; Massachusetts, \$15,000—Minimum \$2,000; Minnesota, \$17,500; Missouri, \$15,000; New Hampshire, \$10,000; New Mexico, \$10,000; Oregon, \$10,000; South Dakota, \$20,000; Virginia, \$15,000; West Virginia, \$10,000; Wisconsin, \$15,000 (Larger amount may be awarded, up to \$2,500 to parent, husband or wife; widow with dependent children may recover up to \$7,500 above maximum).

For information with respect to countries, other than the United States, please refer to the full analysis and tableau on the System of Liability and Limits applicable by States, parties to the Warsaw Convention, to carriage by air other than carriage defined in the Warsaw Convention. See Annex VI of the Statement on the "Economic Aspects of Possible Changes in the Liability Limits of the Warsaw Convention" of the Air Transport Committee—ICAO Doc. 7450-LC/136—Documentation for the 9th Session of the Legal Committee, Rio de Janeiro, 1953—Vol. II, pp. 217-231.

²⁴ Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw 1929), Article 22.

²⁵ The new limits compare favorably with the \$100 limit of the 1949 Contract, taking into consideration the allowance of 44 lb. (or 20 kilos) baggage, the limit of carrier's liability will be $20 \times \$16.00$, *i.e.* \$320 approximately, plus unchecked baggage \$332 approximately, making a total of \$652 approximately instead of the previous \$100.

²⁶ See Footnote 21.

for the purpose of clarity contains a new Article to be inserted in the Warsaw Convention (*i.e.* Article 25a) which, in respect to carriage to which the Convention applies, extends the limitation of liability of carrier to agents, servants and representatives. The purpose of subparagraph (e) is to achieve the same objective until the Protocol becomes effective and thereafter with respect to carriage to which the Convention does not apply.

PARAGRAPH (5)

“Checked baggage carried hereunder will be delivered to the bearer of the baggage check upon payment of all unpaid sums due carrier under carrier’s contract of carriage or tariff.”

The only point which requires mention here is that the bearer of the baggage claim tag, which is issued for identification purpose only and which is not the baggage check, has only right to delivery of the baggage in as much as he is in possession of the baggage check (being a part of the passenger ticket). A carrier may refuse delivery of the baggage to the person holding the baggage claim tag, in the event the passenger does not also have the baggage check. Should any carrier make deliveries of baggage without insisting on the above requirements, it exposes itself to the consequences arising out of the unauthorized deliveries of baggage, *e.g.* honoring lost or stolen claim tags.

PARAGRAPH (6)

“When validated, this ticket is good for carriage from the airport at the place of departure to the airport at the place of destination via the route shown herein and for the applicable class of service and is valid for one year from the date of commencement of flight except as otherwise provided in carrier’s tariffs or regulations. Each flight coupon will be accepted for carriage on the date and flight for which accommodations have been reserved; when flight coupons are issued on an ‘open date’ basis, accommodations will be reserved upon application subject to availability of space.”

The expression “when validated” may sound inelegant. It is said to mean that a ticket only becomes valid when it bears a stamp or writing on it to the effect that the ticket has been officially issued by the carrier.²⁷ The purpose of this requirement is to avoid unauthorized use of ticket stocks which may be lost or stolen from offices of carrier or its agents.

A valid ticket is good for carriage from the airport of departure to the airport of destination on a class of service agreed between the carrier and the passenger. The validity is limited to one year; that is to say that the passenger shall have no right to carriage after this period has expired. That requirement does not mean that the carrier will in no circumstances extend the ticket, or will not make a refund of the fare. All it means is that the passenger has no right on his orig-

²⁷ See IATA Traffic Glossary contained in IATA Bulletin No. 17.

inal ticket to seek carriage. There are good reasons why this requirement is imposed, to mention two: *e.g.* the services of the carrier may be discontinued between the points for which carriage was contracted originally; fare concession in connection with the return ticket if allowed to continue indefinitely would be a great administrative burden on the carrier.

International passenger transportation is presently administered on a reservation basis, thus the right of the passenger to carriage exists only if a seat has been reserved for him. It is not inconceivable that a ticket is issued with, for example, the return flight portion on what is called an "open date" basis, *i.e.* no reservation is confined with respect to the return leg of the journey. In such a case, the obligation of the carrier to carry is conditional upon the availability of a seat for the passenger.²⁸

PARAGRAPH (7)

"Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch, but no particular time is fixed for the commencement or completion of carriage. Subject thereto, carrier may without notice substitute alternate carriers or aircraft and may alter or omit the stopping place shown on the face of the ticket in case of necessity. Times shown in timetables or elsewhere are approximate and not guaranteed, and form no part of this contract. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections."

The new contract expressly provides an undertaking on the part of the carrier to use its best efforts to carry the passenger and baggage with reasonable dispatch. This undertaking, although implied in the 1949 Contract, was not stated expressly therein. The new language does not materially change, however, the situation because carriers were keen to maintain their schedules. They considered that unexplained delays were bad from the business point of view and they have done everything to avoid them.

In the present state of development of international air transportation, it is still not possible for carriers to contract with the passenger as to the exact times of departure and arrival. Accordingly, timetables cannot form part of the contract and the schedules are subject to change without notice.²⁹ It is reasonable that carriers reserve to themselves the right to substitute alternate carriers or to change the stopping places in case of necessity. All this is primarily, for the reason of safety. It must be mentioned, however, that any abuse of this right, presumably will be checked by the keen competition between carriers in the quality of the service they provide to the traveling public.

²⁸ Thus if no seat is available due to heavy seasonal bookings, the passenger may lose the benefit of certain fare concessions applicable only within the prescribed period, such as a seasonal fare, or return fare discount.

²⁹ In this connection, it is of interest to note that railways in the Union of South Africa undertake in their contract that trains shall not depart earlier than the time indicated on the timetables.

Paragraph (7) may have some bearing on the construction of Article 19 of the Warsaw Convention which makes the carrier responsible for delay. Presumably the carrier will be responsible for the delay if it does not comply with its undertaking in paragraph 7 of the contract which must be read as a whole. Again there will be some distinction between "Warsaw" and "non-Warsaw" cases. In "Warsaw" carriage, in order to avoid liability, the burden will be on the carrier to prove that he and his servants have taken all necessary measures to avoid the delay and in particular, that they have used their best efforts to carry the passenger with reasonable dispatch. In "non-Warsaw" carriage, the burden of proving any breach of contract will be on the passenger.

Another difference between the 1957 Contract and the 1949 Contract is the omission from the former of the statement that cancellations, etc., would be made without liability "other than making refund in accordance with carriers' regulations." It is submitted, however, that the omission of this statement does not materially change the situation. The fact that the carrier reserves in the contract the right to take certain actions implies that he can do so without incurring liability. The conditions under which carriers will exercise this right presumably will be described and will also be governed by applicable IATA resolutions.

PARAGRAPH (8)

"The passenger shall comply with all government travel requirements, present all exit, entry, and other documents required by the law, and arrive at the airport by the time fixed by carrier or, if no time is fixed, sufficiently in advance of flight departure to permit completion of government formalities and departure procedures. Carrier is not liable for loss or expense due to passenger's failure to comply with this provision."

Paragraph (8) speaks for itself. It seems to be reasonable to require the passenger to be in possession of all documents required for his journey and to ask him to be at the airport in sufficient time to permit of completion of government formalities.³⁰ It also appears to be reasonable for carrier to deny all responsibility for damage suffered by the passenger due to the fact that the passenger is not equipped with a document for his clearance or entry into a given state. Carriers do make efforts to check known government requirements of the country of departure, transit or destination. They cannot, however, thereby become responsible for decisions taken at the discretion of Immigration and Customs authorities. Under the laws of certain countries, the permission to enter, notwithstanding a valid visa of the passenger, is subject to the discretion of the Immigration officer who may reject, in certain circumstances, the passenger holding a valid visa.³¹

³⁰ *Tumarkin vs. Pan American World Airways, Inc.*, Superior Court of New Jersey, C.C.H. Av. L. R. 2, pp. 18,152-18,154.

³¹ U. S. Immigration Act of May 26, 1924, as Amended: To limit the Immigration of Aliens into the United States, etc. Sect. 13 (43 Stat. 153; 8 U.S.C. 201).

PARAGRAPH (9)

"No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract."

The purpose of this provision is to present the unauthorized amendment of the contract on the passenger ticket by agents or employees of carriers. In some countries, an amendment to the contract of carriage by an agent would not be valid in any case unless a tariff provision to that effect had been filed with the appropriate authorities. The same does not apply, however, in other countries. In the absence of such provision, uncertainty may exist as to who may set the terms of the contract of carriage: It is not inconceivable that an agent, or representative of the carrier, perhaps with the best intention, but not being entirely familiar with the contract provisions, might make a representation which then could be considered as modifying the contract. It is submitted that with the present provisions, no such modification may be valid. It must be pointed out, however, that the carrier may, in exceptional cases, make a special contract with the passenger. Under the present system, and without consulting the other carriers participating in the carriage, this can only be done for on-line transportation, *i.e.* on the line of one carrier only and would no doubt require an undertaking on the part of the carrier.

PARAGRAPH 10(A)

"No action shall lie in the case of damage to baggage, unless the person entitled to delivery complains to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt; and in the case of delay, unless the complaint is made at the latest within 21 days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing and dispatched within the times aforesaid. Where carriage is not 'international carriage' as defined in Convention, failure to give notice shall not be a bar to suit where claimant proves that (i) it was not reasonably possible for him to give such notice, or (ii) that notice was not given due to fraud on the part of carrier, or (iii) the management of carrier had knowledge of damage to passenger's baggage."

This paragraph deals with the requirement of notice of damages in connection with baggage. It requires that a notice be given to the carrier within a reasonable period of time, in writing. It will be observed that no such requirement exists in respect to damage to passengers. The delays are the same for giving notice as those incorporated in Article 29 of the Warsaw Convention, as amended by The Hague Protocol of 1955.³²

The old contract merely referred to carriers' tariffs which in turn contained the notice requirement. Objections were expressed by certain governments against what was termed as "unreasonable" shortness

³² See Footnote 21.

of these delays for notice. Moreover, it had been insisted³³ that in carriage not coming under the Warsaw Convention, the contract should not bar all action of passenger for failure to give notice in the event carrier had actual knowledge of the loss and was not prejudiced by lack of notice.

The requirement by carrier to receive notice of damage has a sound practical reason. Its purpose is not so much to finalize the actual claim as to receive some form of notice of a possible future claim so that carrier can investigate promptly the circumstances in which damage or delay was caused to the baggage. If the delays for the notice were to be extended or if the effect of the notice requirement were to be limited in general terms to events in which carrier was not prejudiced by the lack of notice, the purpose of the notice would be hampered. Whilst the Courts would probably accept the premise that the lack of notice prevented carrier from proceeding with his investigation, nevertheless the Court would still have to be satisfied that this had caused prejudice to the carrier. Any general requirement therefore that lack of notice has no bearing on the right of recovery unless carrier was prejudiced might shift the burden of proof and would probably increase litigation expenses.

The last sentence of Paragraph 10 (a) refers to international carriage not covered by the Warsaw Convention. In such circumstances, the fact that notice is not received by the carrier will not be a bar to suit in the three situations quoted above.

The first case envisages a situation where the passenger, himself suffering injuries, might be hospitalized for an unusual length of time and during which he could not give notice to the carrier. Because of his stay in hospital, he might not have been able to discover the damage to his luggage at an earlier date.

The second case is designed to prevent fraud. It was suggested that that situation might be possible where the passenger gives no notice to the carrier, because he was assured by some agent that his claim would be settled without any notice. It is quite unlikely that such occurrence may ever arise but if it did, presumably the applicable law of the various jurisdictions would take care of the situation without the express provision in the contract. Thus this provision is superfluous.

The third case refers to the situation where it is quite apparent that the management of the carrier knew of the damage which was suffered by the passenger. This language is not without ambiguity because the word "management" is not defined. In this connection, it is submitted that that knowledge possessed by the manager of the airline at the airport presumably would be considered a sufficient bar to the notice requirement. However, knowledge on the part of the agent who assists the passenger in handling his baggage, or a porter, may not be considered sufficient. There may be, of course, border line cases and it is not without doubt as to whose knowledge of the loss,

³³ CAB Order E-8543 of August 5th, 1954.

on the part of other employees and agents of the carrier, would be considered material by the Courts. It is submitted that matters will be complicated by the three exceptions from the notice requirement but these exceptions are applicable only in a comparatively small number of cases.

PARAGRAPH 10(B)

"Any right to damages against carrier shall be extinguished unless an action is brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. The method of calculating the period of limitation shall be determined by the law of the court seised of the case."

This paragraph embraces the principle contained in Article 29 of the Warsaw Convention and thus extends the two-year limitation on the right of action of the passenger to carriage which is not governed by the Warsaw Convention.

A general observation might be appropriate at this point. The new 1957 Contract appears, by far, to be more generous to the travelling public than any standard airline ticket contract written heretofore, and compares favorably with contracts generally in use in other means of transportation.

The new contract seems to be part of the growing evolutionary process of extending the facilities offered to the public by the airlines. This has been a gradual development. What could not be offered several years ago, when only a few hundred thousands of people were travelling by air, can now be offered to the public because millions of people are making use of the opportunities of air travel.